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I. MSTA

The Missouri State Teachers Association (MSTA), formed in 1856, is the oldest and largest professional teachers association in Missouri. MSTA represents over 42,000 members, more than 35,000 of whom are certified as teachers – the most of any organization in the state. It is the third largest independent education association in the nation.[1]

MSTA's mottos, "Children First" and "Teachers Care", bespeak the first stated objective in its constitution, which is "to maintain a close organization of teachers of Missouri for the welfare of the *student population*." See Appendix 1, Constitution and Bylaws of the Missouri State Teachers Association, Adopted Nov. 8, 1919, Rev. Nov. 16, 2001 (emphasis added). MSTA members understand that public schools exist for the benefit of students and not merely to provide jobs for teachers. They are dedicated professionals who have chosen to work with our children and understand that there will always be full and fulfilling employment for those who exhibit caring and excellence in their chosen work.

MSTA is an all-inclusive organization; besides teachers, who make up approximately 75% of the membership, MSTA members include principals,

[1] Only the Association of Texas Professional Educators (ATPE) and Georgia's Professional Association of Georgia Educators (PAGE) are larger. Like MSTA, ATPE and PAGE are the largest education associations in their respective states.

superintendents, nurses, counselors, paraprofessionals, secretaries, cooks, bus drivers, custodians and all other personnel needed to staff our public schools. MSTA members also are informed and involved parents, voters and taxpayers in the communities in which they live.

MSTA members believe the best educational environment for children is built on a foundation of cooperation and collaboration among all educational personnel including teachers, administrators, and school board members, not an adversarial "us vs. them" climate founded on suspicion, distrust and a desire for one side to "win" at the disadvantage of the other side. They understand that in an adversarial environment, everyone loses – especially students.

As an independent association, MSTA has no national ties or agenda. MSTA's legislative platform addresses only issues related to public education in Missouri. See Appendix 2, MSTA's Legislative Priorities. MSTA members come from varying backgrounds and political ideologies. They have differing views on many state and national issues such as gun control and abortion, and they do not want or need assistance or intercession in those areas. What MSTA members share is a commitment to children and excellence in public education in the State of Missouri.

MSTA is a grassroots organization whose policies are influenced from the foundation up rather than from the top down as in other organizations. It is made up of local Community Teachers Associations (CTAs) in each Missouri school district, reflecting MSTA's strong commitment to local control. At MSTA's annual convention, the Assembly of Delegates, the association's legislative body made up of elected

representatives from all local CTAs, establishes the association's philosophy and legislative platform by voting on proposed resolutions and constitutional amendments submitted by individual members and CTAs during a comprehensive resolutions process.

It is through the resolutions process that MSTA members have reaffirmed year after year, the position that collective bargaining for teachers is a bad idea – bad for children, bad for teachers, bad for education. Although not a union, MSTA provides all of the same comprehensive services and benefits to its members. Its departments include Salary and Research, Governmental Relations, Legal Services, Education, and Membership Services. See Appendix 3 for a more comprehensive description of the benefits and services MSTA members receive.

MSTA's Interest

Appellants/Plaintiffs and other advocates of collective bargaining in public education purport to speak on behalf of Missouri's teachers and would have this court believe that their position on the issue is shared by most, if not all, Missouri teachers. In fact, MSTA speaks for more Missouri teachers than any other organization in the state: Teachers who are on the front line – responsible for the daily instruction and supervision of Missouri's children; Teachers who oppose the adoption of collective bargaining in public education; Teachers who, if collective bargaining is adopted, will be forced to support unions even when they are opposed to doing so; Teachers whose livelihoods will be directly affected by this Court's decision. MSTA holds itself out as "the Voice of Missouri Teachers." It is a voice that should be heard by this Court.

II. MCSA

The Missouri Council of School Administrators (MCSA) is the umbrella organization for the Missouri Association of School Administrators ("MASA"), which represents approximately 500 school superintendents, and the Missouri Association of Elementary School Principals (MAESP), which represents approximately 900 elementary and middle school principals. MASA and MAESP have long histories as the professional representatives of public school superintendents and elementary principals, respectively, with MASA being organized prior to 1900 and MAESP being organized in the early 1920's. Both associations are recognized as the charter organization for their memberships by their national affiliates, which are the American Association of School Administrators (AASA) and the National Association of Elementary School Principals (NAESP).

MASA and MAESP members, who serve as school district and school building chief administrators, have the major and final responsibility for management and supervision over the daily operations of public school programs within their communities. Their duties include establishing and implementing school district budgets; establishing district curricula and instructional programs that meet or exceed Missouri School Improvement Program (MSIP) and federal educational standards; hiring, training and supervising certified and non-certified staff; and ensuring maintenance of safe facilities and environments conducive to student learning and achievement.

MCSA's Interest

School administrators are directly responsible for ensuring that our children receive an appropriate education in an optimal learning environment and that our children are not "short changed" by receiving limited educational opportunities. They are held accountable by local boards of education for student achievement and for the overall results of the educational programs in their school districts. The daily conduct of school district business and the administration of school district budgets will be directly affected by this Court's decision. Accordingly, they have a great interest in and concern over limits that may be imposed on their decision-making, discretion, flexibility and professional judgment if collective bargaining becomes the rule of law in this state. MCSA is the voice of those administrators and should be heard by this Court.

ARGUMENT

I. Introduction

The Missouri State Teachers Association (MSTA) and the Missouri Council of School Administrators (MCSA) share a common goal to put the interest of Missouri school children first and provide them the best possible education in the best possible environment. To that end, the two associations join in this brief as *amicus curiae* in support of Respondent Jefferson City School District. MSTA and MCSA support and adopt by reference the arguments and issues presented in Respondent Jefferson City School District's brief in opposition.

The decisions of this Court over the last fifty years have correctly analyzed the breadth and scope of collective bargaining in Missouri. The Court dealt squarely with the issue in *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), when it determined that Article I, Section 29 of the Missouri Constitution does not extend collective bargaining to public sector employees. The Court reviewed Article I, Section 29 in conjunction with all other provisions of the Missouri Constitution. The Court reasoned that to maintain appropriate separation of powers and to ensure that local governmental entities retain final decision-making authority regarding terms and conditions of employment and provision of services to the public, application of Article I, Section 29 must be limited to private sector employees only. *Id.*

The Court's reasoning is just as applicable today and has been upheld repeatedly, including in 1982 when this Court considered *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1982) and in various constitutional challenges to the Missouri Public Sector Labor Law, RSMo. Sections 105.500 – 105.530. See *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 42 (Mo. 1969). No events have occurred that merit this Court overturning the current law regarding public sector collective bargaining in Missouri. Moreover, the legislature once again in 1999 rejected a well-organized attempt to enact a comprehensive public employee collective bargaining act.[2] This Court is bound to uphold its prior decisions and the unambiguous will of the legislature and state unequivocally, yet again, that beyond the meet and confer provisions of the public sector labor law, which specifically excepts teachers, collective bargaining in Missouri does not extend to public employees.

II. Why MSTA Opposes Public Sector Collective Bargaining

MSTA members stand opposed to collective bargaining in the public sector for many reasons. They believe that any possible improvements in salaries, benefits and class size promised by collective bargaining– and such improvements

[2] In fact, bills to adopt collective bargaining rights for public employees are filed yearly, but seldom make it out of committee because the legislative leadership determines there is not enough support to bring the bills before the full legislative body.

are by no means guaranteed – are far outweighed by the harm to the educational rights of students. The dangers of collective bargaining include decreases in money allocated to purchase supplies, equipment and other resources due to increased salary and bargaining costs; demonstrable decreases in student achievement; [3] loss of educational opportunities for students due to a shift in focus from what is best for students to the processes of negotiating and arbitrating grievances and contracts; loss of professional autonomy and personal choice to teachers; loss of local control by citizens, taxpayers and elected school boards over budgets and operations; creation of contractual impediments to implementation of reform measures; failures of accountability; and degeneration of working relationships among teachers, administration and school boards by creation of a divisive, adversarial climate.

MSTA is not opposed to collective bargaining in the private sector where increased costs can be passed on to the consumer in the form of a price increase. But public schools in Missouri do not have the same ability as private sector industries to unilaterally raise their prices to offset the increased costs that routinely accompany adoption of collective bargaining. That would require a tax increase, which can only be accomplished by a vote of the people. Mo. Const. Art. X, § 11(c)

[3] *See* pp. 21-25 *infra* for a full discussion of the negative effect collective bargaining has on student achievement.

A. Collective Bargaining in Schools is Bad for Students

Collective bargaining ignores students. Access to a free public education is a fundamental right guaranteed by the Missouri Constitution. Mo. Const. Art. IX, § (1)(a) (1976). Strikes, work stoppages, "blue flu", working to rule/contract and other weapons commonly associated with collective bargaining effectively deny students uninterrupted access to that fundamental right. Advocates of collective bargaining in the public schools seek to reassure that provisions making such actions illegal would insulate school districts and students from such actions. But history tells a very different story. Time and time again, despite the fact that it is illegal to do so, public employees, including teachers, have gone on strike in an attempt to force a favorable outcome in bargaining negotiations. *See St. Louis Teachers Ass'n v. Bd. of Educ.*, 544 S.W. 2d 573 (Mo. banc 1976); *Phipps v. School Dist. of Kansas City*, 645 S.W. 2d 91 (Mo. App. 1982); *Parkway School Dist. v. Provaznik*, 617 S.W. 2d 489 (Mo. App. 1981); *Willis v. School Dist. of Kansas City*, 606 S.W. 2d 189 (Mo. App. 1980); *School Dist. of Kansas City v. Clymer*, 554 S.W. 2d 483 (Mo. App. 1977); *Issaquah Teachers Vote to Defy Judge; Snohomish Teachers OK Contract*, The Seattle Times, September 24, 2002; *See also* U.S. Bureau of Labor Statistics, citing 5 instances in 2001 of public

sector work stoppages, 4 of which occurred in education.[4] The foregoing are but a small sampling of illegal strikes and work actions.

Sanctions against such actions either do not exist or are often so weak as to be practically ineffective. Union officials have been known to encourage such actions even when they are illegal. See *St. Louis Teachers Ass'n v. Bd. of Educ, etc.*, 544 S.W. 2d 573 (Mo. banc 1976) (St. Louis Teachers Association urged teachers to strike, which they did, closing schools for two months). A current example from the State of Washington illustrates the point. On Wednesday, September 25, 2002, *The Seattle Times* reported that teachers in the Issaquah School District voted by a ratio of 2-1 to defy a judge's order to return to work from a 3-week-old walkout. Washington law prohibits public employees from striking. *Issaquah Teachers Vote to Defy Judge; Snohomish Teachers OK Contract*, The Seattle Times, September 24, 2002. In the meeting preceding the vote, the union's attorney advised members that although the court could order

[4] In 2001, the average length of a work stoppage was 22 days. *Major Work Stoppages in 2001,* Bureau of Labor and Statistics, USDL 02-153, March 22, 2002. A review of strike activity in Pennsylvania over the last 30 years following the adoption of public sector collective bargaining shows an average of 14.7 teacher strike days per year, not including weekends and other nonscheduled work days. *See Thirty Years of Collective Bargaining in Pennsylvania: Have Public Education and the Public Benefited?* PSBA Bulletin Reprint, Apr. 2000.

teachers who violate the order to jail or to pay fines, the court's calendar was too crowded to conduct the due process hearings to enforce the order; the jail was too crowded to hold them all; and that no teacher had ever paid a fine in the years the lawyer had been employed with the union. *Id.* The union's lawyer had similar advice with respect to the potential for disciplinary proceedings or terminations for misconduct by the school district: "the district would not undertake 600 or so discharge hearings . . . because hearings can cost $50,000 to $80,000." *Id.* Meanwhile, 14,000 students continued out of school until October 6, 2002, a full month after school was scheduled to start. *Id;* Colleen Pohlig, *School District, Teachers Reach Deal on Making Up Strike Days*, The Seattle Times, October 5, 2002.

When courts and school districts do undertake to enforce the law with sanctions, disciplinary action and terminations, the financial, emotional and social costs are enormous, including the process costs, which will be discussed more fully, *infra*. *Phipps v. School Dist. of Kansas City*, 645 S.W. 2d 91 (Mo. App. 1982; *Willis v. School Dist. of Kansas City*, 606 S.W. 2d 189 (Mo. App. 1980); and *School Dist. of Kansas City v. Clymer*, 554 S.W. 2d 483 (Mo. App. 1977) are three cases arising from a 1977 teachers' strike called by their union, Kansas City Missouri Federation of Teachers, Local 691 (AFL-CIO). They demonstrate the long term financial detriment to a Missouri district and its student population when illegal strikes called by the union require years of expensive litigation to sort out and resolve.

In 1970, Pennsylvania passed a comprehensive collective bargaining act, Act 195, that gave public employees, including teachers, the right to strike. The act was intended remediate the wounds of labor interests, but instead the result was more distress and turmoil than before:

> In the years following passage of Act 195, Pennsylvania was home to more school strikes that [sic] any other state in the country. The data alone could never measure the disruption that more than 800 walkouts, affecting nearly four million students and idling more than a quarter million school employees caused in communities across the state.

PSBA Bulletin Reprint No. 2, (Apr. 2000) at 4.

These consequences may be unintended, but they are real and the true victims are students who lose opportunities in the form of lost hours in the classroom and lost monetary resources that would otherwise be spent directly on educating them.

MSTA members recognize that public schools exist to provide students an education and not merely to provide jobs for teachers. They also understand that there will always be full and fulfilling employment for those who exhibit caring and excellence in their work. However, the very nature of collective bargaining is employee-oriented, and during negotiations, there is a fundamental shift in focus from what is in the best interests of students to what is in the best interests of the

bargaining unit.[5] In a blatant example of self interest during negotiations in one school district, union-affiliated teachers "refused to write letters of recommendation for college-bound seniors unless students wrote letters to legislators urging them to increase teachers' salaries." W. Tucker, *More Money*, Forbes, Vol. 148, Issue 13. P. 184 (Dec. 9, 1991). *See also Issaquah Schools to Reopen; Teachers Vote to Defy Court*, The Seattle Times, September 25, 2002. Extras such as before- and after-school tutoring and other specialized programs, which exist because they help children succeed, become bargaining chips. These programs cannot and will not be staffed, and therefore will not be offered to students, unless they are included in the master bargaining agreement.[6]

In New York City, a recent bargaining agreement relieved teachers of their traditional non-teaching duties such as supervision of the schoolyard, cafeteria,

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[5] *See* Karen Helland and Corrie White, *Collective Bargaining in Public Schools: Turning the Focus to Students*, (Evergreen Freedom Foundation, May 2000) p.8. Unions frequently claim that "whatever is in the best interest of teachers also must be in the best interests of students," when in fact, the whole point of forming a union is to protect its members. *Id.*

[6] *See* La Rae G. Munk, J.D., "Collective Bargaining: Bringing Education to the Table: Analysis of Michigan School Labor Contracts and Recommended Improvements to Help Teachers, School and Students," (Mackinac Center for Public Policy Education 1998).

and hallways, and many other ordinary tasks like collecting lunch money and handing out supplies, resulting in a great deal of turmoil and disruption. Principals observed:

> …relieving teachers of these non-instructional duties meant that teachers and students were no longer involved in many of the positive informal interactions that the previous system fostered, and that aides had proven to be no substitute for teachers in this respect. They are not viewed in the same way as teachers, and their exchanges with students lack the significance of interactions with teachers.[7]

In New York City, the workday is tightly controlled by the contract. Teachers may come and go on the same schedule as students and are not required to be available before or after school for students who want or need to discuss matters with their teacher. In addition, teachers cannot be required to attend more than one 45-minute faculty meeting per month. [8] Administration requests for voluntary attendance at more meetings is vigorously resisted by the union, even

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[7] Dale Ballou, *The New York City Teachers' Union Contract: Shackling Principals' Leadership* (Manhattan Institute for Public Policy Research, Civic Report 6, 1999) at 16.

[8] *Id.* at 17; *Id.* at note 33.

though some inexperienced teachers have expressed a need for the additional guidance. These teachers are kept away by union pressure.[9]

One principal attempted to place additional students in an honors section of class, which would necessitate exceeding the contract's limit on class size. In spite of the teachers' willingness to take on additional students as expressed in writing to the administration, the union filed a grievance. It claimed that individual teachers can not be permitted to "renegotiate" the contract. As a result of the absurd position taken by the union, the students were denied placement in the honors section and returned to regular classes.[10]

Collective bargaining in public schools further harms students by draining financial resources that would otherwise be used to improve facilities, purchase equipment and classroom supplies, and develop student programs to cover the increased costs to districts for legal representation and arbitration proceedings. *See* Part II. D., *infra* at 30 for a complete discussion.

Perhaps the most compelling argument against collective bargaining in public schools is that, in these days of accountability for student achievement and the President's plan to "Leave No Child Behind," collective bargaining has a demonstrable negative impact on student achievement. In 1996, Harvard Economics Professor Caroline M. Hoxby published what may be the definitive

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[9] *Id.* at 17.

[10] Ballou, *supra* note 7, at 18.

study of the effect of teacher unions on student achievement.[11] Professor Hoxby concluded that "teachers' unions succeed in raising school budgets and school inputs but have an overall negative effect on student performance."[12] Hoxby's study and analysis are far more complex than can be reviewed fully in this brief, but due to the strong scientific evidence and the importance of her conclusion, it is imperative that the Court understand the superior quality of her research methodology and how it is distinguishable from the many other less sophisticated and less reliable works on this topic. Hoxby's methodology survives the most rigorous examination by her peers and her conclusions are sound.[13]

For a study protocol to yield valid and reliable data, it is critical that nonrandom effects, or bias, be eliminated. Many other published studies on this topic have been cross sectional models that look at events at a particular point in time. Those study results are not reliable because they do not eliminate as

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[11] C.M. Hoxby, *How Teachers' Unions Affect Education Production*, The Quarterly Journal of Economics 111 (1996): 671-718. Appendix 4.

[12] *Id*. at 708.

[13] Dr. Michael Podgursky, Middlebush Professor of Economics and Chairman, University of Missouri-Columbia, states in an opinion letter attached as Appendix 5 that Hoxby's strong evidence that collective bargaining raises costs and lowers school district performance is based on the best study on the topic to date, by far, by using the most sophisticated methodology.

causative factors the variables that are found to be constant over time if a long enough time period is studied. A cross sectional approach may lead to an erroneous conclusion that a nonrandom agent is causal.[14]

What distinguishes Hoxby's study as state of the art is its sophisticated methodology. That methodology looks for an event of unionization exogenous to the circumstances of any individual school district and effectively eliminates the unobservable variables that are constant over time and those that have a constant trend over time.[15] The discrete events that Hoxby uses are the enactment of state collective bargaining laws of three types: (1) laws explicitly extending the right to meet or to engage in collective bargaining; (2) laws allowing teachers' unions to have agency shops; and (3) laws allowing union shops.[16]

Hoxby made demonstrable methodological improvements over previous studies by implementing changes such as the use of strict definitions, and a large matched database. Additionally, her use of before, during, and after observation of school districts during the period of unionization enables her to distinguish effects of unionization from other factors that cause a school district to unionize.

[14] Hoxby, *supra* note 11 at 672-73.

[15] *Id.* at 674-675.

[16] *Id.* at 682-683.

She uses the macro changes in state laws as the event of unionization to further remove local, school level effects.[17]

To eliminate measurement error, Hoxby used the strict definition of unionization to mean the form of collective bargaining that resulted in a contractual agreement between the administration and the teachers' union in circumstances where at least 50% of total or full-time teachers were union members.[18] Her analysis was based on a very large sample of 10,509 school districts, which at the time represented about 95% of the total in the United States.[19] She matched data from multiple sources to obtain this large, representative sample of schools at multiple points in time that span the era of unionization, 1960 to 1990.[20]

In her study, Hoxby found that teachers' unions are "primarily rent seeking;" using that term to denote "the model in which teachers' unions prefer

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[17] *Id.* at 710-712.

[18] *Id.* at 681-683.

[19] *Id.* at 685.

[20] *Id.* at 673. Hoxby matched data from the Census of Governments (1972, 1982, and 1992), and the decennial Censuses of Population and Housing of school districts (1980 and 1990). She personally matched census blocks and enumeration districts to school districts for the 1970 census and created a unique database on school districts.

different inputs than parents do because the union's objective is not purely maximization of student achievement."[21] Generally, "rent" is used by economists to mean excess payments of any kind. Professor Hoxby concluded that under this model teachers unions have the effect of "raising school budgets and school inputs but lowering student achievement by decreasing the productivity of inputs."[22]

Professor Hoxby's conclusion that "teachers' unions succeed in raising school budgets and school inputs but have an overall negative effect on student performance"[23] provides an extraordinarily persuasive reason for the Court to decline to venture further into considerations of collective bargaining in the public sector. The Court should give this scientifically derived evidence strong consideration, weight, and approbation to reach the result that collective bargaining is not a viable solution to Appellants' problems nor to those challenges faced by Missouri students.

B. Collective Bargaining in Schools is Bad for Teachers

Collective bargaining in public schools takes away teachers' autonomy and ability to exercise independent professional judgment. Collective bargaining is about control and conformity. Every aspect of the work day is the subject of negotiation and is determined by the master agreement. Examples include the

[21] *Id.* at 675-676.

[22] *Id.* at 711-712.

[23] *Id.* at 708.

logistics of who gets keys and classroom assignments to more substantive issues such as lesson plan format, curriculum decisions, textbook selection and when and how long a teacher may provide tutoring. Teachers who deviate from the master agreement do so at their peril. An MSTA member who taught in Illinois recalls the tension she felt from pressure exerted by her peers when she came in early or worked late in her classroom tutoring students, grading papers, etc**.** A teacher who persists in such actions can find him or herself the subject of a grievance filed by the union or by a coworker.[24]

Collective bargaining in public schools takes away teachers' freedom of association and freedom of choice. Upon formation, a bargaining unit votes to choose which organization will represent it in negotiations and grievances.[25] In most cases, a majority vote makes one organization the exclusive agent of the unit and all other organizations, regardless of how large the minority they may represent, are denied a seat at the negotiation table. Management must deal solely with the union on wages, hours and terms and conditions of employment.[26] This is

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[24] *See* Ballou, *supra* note 7 at 17. In his interviews with principals, they reported many hardworking and caring New York City school teachers willing to discuss the pressure they felt from the union and their peers in confidence, but unwilling to have their names used. *Id.* at 19.

[25] *The Developing Labor Law* 337 (3d ed. 1992).

[26] Munk, *supra* note 6, at 24-25.

known as an agency shop. In that setting, "if a school board wished to contract with a math, science, or professional teacher organization for the purposes of professional development for its staff members (a term of employment), it would first require the union's permission."[27] The exclusivity extends to representation in grievance situations; most contracts specify that only the exclusive bargaining agent will be permitted to represent an employee in a dispute.

In an agency shop arrangement, fair share fees limit teachers' choice of association even further. The exclusive agent is permitted to charge a fair share fee for representation, which is deducted from the pay of all teachers, regardless of whether or not they wish to join the agent organization. The result is a two-fold loss of choice. First, teachers can be required to provide financial support to an organization that they do not wish to join and with whose philosophies and agenda they may wholeheartedly disagree.[28] Second, although teachers still maintain a

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[27] Munk, *supra* note 6, at 24-25.

[28] Unions, particularly those with a national affiliation, often take positions on issues outside the realm of education – positions on controversial issues such as abortion and gun control to which many people may have strong opposition. Two excellent works on the rise of the most powerful teacher unions and their influence on education, economics, and politics are Terry M. Moe, *Teachers Unions and the Public Schools*, A Primer on America's Schools 151 (Terry M. Moe ed., 2001)) and Myron Lieberman, The Teacher Unions 229 (The Free Press 1997).

constitutional right to join any organization they choose, as a practical matter, that choice may be foreclosed; that is because once they have paid the required cost of a fair share fee to an organization they might not otherwise choose or support, they may not have the resources to pay additional dues to the organization to which they would prefer to align themselves.

In Munk's 1998 review of collective bargaining contracts in Michigan school districts, she found that fair share fees in most districts with agency shop clauses (perhaps more aptly known as union security clauses) averaged 2% of the negotiated base pay. Thus, a teacher who earns $30,000 per year is required to pay $600 in agency shop fees.[29] Munk also concludes that "[c]ompulsory unionism for public school employees brought about by union security clauses has

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Lieberman's unique insight partially derives from his experience as a long time member of NEA and AFT. *See also* his discussion of Teacher Unions and the Civil Rights of Teachers at 63-64.

[29] Munk, *supra* note 6, at 25. As a point of comparison, a full active MSTA member, MSTA's most expensive membership category, pays $189.00 per year for comparable representation and benefits. Such reasonably priced representation and protection will be made impossible if public sector collective bargaining is adopted in Missouri.

had profoundly negative effects on school districts. It has lowered teacher morale and professionalism…."[30]

Collective bargaining cannot guarantee improved salaries and working conditions. The school district revenue pie is limited in size. It cannot be made bigger without a tax increase – an accomplishment that has proven elusive in recent years. Increased salaries, increased staff to ease classroom overcrowding or to shorten the work day, and other alternatives to improve working conditions all cost money. The money to pay those increased costs to school districts for lawyers and arbitrators to handle negotiations and the inevitable disputes must come from somewhere. It is frequently drained from resources that could otherwise be spent to increase salaries for existing staff or hire new staff to ease overworked conditions and other costs associated with improved working conditions and benefits. The primary beneficiaries of collective bargaining in terms of increased revenue are lawyers, arbitrators and the unions themselves.[31]

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[30] *Id.* at 26. The statute governing union security clauses under Michigan's Public Employment Relations Act does not require fees payment as a mandatory condition of employment, but the school districts, by statute, are expressly permitted to negotiate and require fair share fees as a condition of employment. *Id.* at note 78.

[31] According to Lieberman, the NEA is well aware of the role judges and lawyers play in maintaining its viability and budgets at both the state and national levels.

Collective bargaining makes working conditions less desirable because it is adversarial and divisive rather than collaborative and cooperative. It poisons working relationships among employees, administration and the board by fostering an adversarial climate in schools. MSTA members who have worked in other states that have collective bargaining talk about the tension, lack of trust, endless grievances and pressure to conform that pervade. One who taught in Colorado remembers the "us vs. them" climate that permeated during time to renegotiate. Another former MSTA member who now teaches in Illinois tells how every situation, no matter how minor, is grounds for a grievance.

C. Collective Bargaining is Bad for Taxpayers and Voters

Local control has long been the hallmark of public education in this country. Our nation's highest court has repeatedly found grounds to decide school issues so that they can be returned to the autonomous control of the local citizenry:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision

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Reportedly, NEA's 1995-96 national legal services budget alone was $24 million. Lieberman, *supra* note 30 at 59.

> making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

Martinez v. Bynum, 461 U.S. 321, 329 (1983), quoting *San Antonio School District v. Rodriguez,* 411 U.S. 1, 50 (1973) [citations omitted]. *See also Owasso Independent School District No. 1011 v. Falvo,* 534 U.S. 426 (2002).

Likewise, in Missouri, all branches of government have granted local school districts broad discretion to educate their students and manage their business in the ways best suited to local communities. Article IX, § 2(a) of the Missouri Constitution, vests the supervision of instruction in the public schools in the state board of education. The legislature endowed the state board with the authority to set and supervise the execution of the state's educational policies. Section 161.092, RSMo. The State Board of Education, in turn, has set certain minimum educational standards that must be met by each school district and has left those and many related decisions to the discretion of each school district. *See* Section 160.518, RSMo. (assessment program established); Section 167.031, RSMo (compulsory attendance); Section 167.020, RSMo (registration requirements).[32] Local school boards, made up of members elected by community voters, many of whom are parents of students in the school district, have the authority to set local school district policies. § 171.011, RSMo. These local school boards delegate

[32] *See* discussion and authorities *infra* at Argument V., at 39-40, which illustrate the legislative and judicial delegation of board authority.

responsibility for day-to-day operations to administrators who presumably are hired on the basis of their ability and expertise and who work in concert with teachers to develop curriculum, plan educational programming, select textbooks, determine teacher placement, administer school budgets, determine salary and benefit schedules, and make many other decisions relating the specific educational needs and resources of their individual school districts. §§ 168.191, 168.201 and 168.211, RSMo.

Collective bargaining in public schools changes all that. Binding arbitration takes decisions related to budgets, salaries and benefits, curriculum, teaching methodologies, employee placement, work day parameters and much more out of the hands of locally elected board members – board members who know their communities and the administrators and teachers they hired on the basis of their expertise in education to execute those decisions. Binding arbitration instead places the determination of those matters in the direct control of outside arbitrators – persons with no stake in or understanding of the community and no accountability to local taxpayers and voters for the money they spend and the decisions they make. It is not the arbitrator's job or focus to do "what's in the best interests of these local school children." The arbitrator's sole responsibility is to settle disputes between the bargaining unit and the school district – "labor vs. management." The interests of students are lost.

Not only does collective bargaining remove these decisions from the control of local school districts and the citizenry who elected them, but school districts are responsible to pay the significant costs generated by the process. Costs include, but are not limited to, fees for lawyers to represent the district's interests, fees for the

arbitrator/decision-makers themselves, and sometimes, as discussed above, costs associated with enforcement related to illegal work stoppages and other actions. *See supra*, Argument, II.A. p. 13.

In the fiscal note attached to House Committee Substitute for HB 166, the public sector collective bargaining bill defeated in the 1999 Missouri legislative session, the Department of Elementary and Secondary Education (DESE) estimated that 150 school districts would need to hire attorneys or consultants to assist with labor negotiations with an average estimated cost of $20,000.00 each for a total of $3,000,000.00 in the first year of collective bargaining. In addition, DESE estimated arbitration costs of approximately $10,000.00 for each of 100 school districts for a total of $1,000,000.00 in the first year of collective bargaining. An inflationary factor must also be included to account for future costs. *See* Committee on Legislative Research, Oversight Division, Fiscal Note, L.R. 909-04, HCS for HB 166, March 1, 1999, Appendix 6.

In the same fiscal note, local governments estimated that, if adopted, the impact of collective bargaining on local funds would have been approximately: $24,000,000.00 in 2000, $59,000,000.00 in 2001, and $64,000,000.00 in 2002, respectively, over the next three consecutive fiscal years. *Id.* These estimates necessarily include costs that local school districts must absorb if collective bargaining is mandated in Missouri's public schools. These are monies that could otherwise go to improve facilities, equipment and resources for students, decrease classroom sizes and increase teacher salaries and benefits.

At a time when State and local governments are facing huge financial deficits, additional expenses for labor negotiations, arbitrator fees, and lawyer fees are untenable. School districts unable to raise their tax levies to meet the additional financial obligations will be forced to cut services such as band, sports, tutoring, and any other number of services, as well as classroom resources, in order to meet these added obligations. Such consequences are unacceptable to educators, taxpayers and parents. The limited monies available in our school districts should go toward needed supplies, equipment and improved salaries for school district employees. These monies should not be diverted to third party lawyers and arbitrators who are not required to consider the welfare of our students and the conditions of our public schools.

D. Collective Bargaining is Bad for Education

As discussed previously, the very nature of collective bargaining agreements and union contracts encourages a "labor v. management" relationship that is inherently tense, untrusting and adversarial – not a positive learning environment for Missouri's children. This tendency is perfectly exemplified in the case before the Court. It would appear that rather than work collaboratively and completely through existing channels, the parties polarized and "labor" filed suit against "management." Adversarial relationships encourage a strike mentality and erode public confidence in, and respect for, teachers. In addition, as discussed above, collective bargaining creates tension and distrust among teachers and staff and often pits those who wish to work under cover of the master agreement against

those who for personal reasons strive to go the extra mile, creating pressure that squashes innovation and individual initiative.

Class sizes, textbook selection, retirement plans, definition of instructional time, extracurricular activities, calendar and schedule changes, length of school days, professional development planning, programming and scheduling, and professional and non-certified employee evaluations, are just a few of the areas that would be the subject of collective bargaining.[33] The focus will move from acting in the best interest of the students to acting in conformity with master agreements and union demands. School districts and their personnel would be forced to think of every possible scenario that might occur and incorporate that scenario into the contract. This is impractical, costly and does not improve student achievement.

Finally, but perhaps most importantly in these days of tight revenues, collective bargaining depletes already precarious local education budgets. As discussed previously, unlike the private sector, local school districts cannot institute a price hike when their costs go up – as costs undoubtedly will. "Price hikes" must be approved by the voters in the form of a tax increase – an increasingly difficult goal to accomplish. School districts must spread limited

[33] *See* Moe, *supra* note 28 at 162. Moe observes that the rules about terms and conditions embedded in union contracts are "often in excrutiating detail" and a typical union contract may run over one hundred pages.

resources over a broader spectrum to cover the increasing proportion of non-education related costs. The result: schools cannot do as much for children – their intended beneficiaries – because they are beholden to the collective bargaining process and its unpredictable and uncontrollable costs.

III. Why MCSA Opposes Public Sector Collective Bargaining

MCSA opposes collective bargaining for all the reasons stated above. In addition, MCSA opposes collective bargaining because it impairs the ability of administrators to exercise professional judgment and discretion in order to ensure that the needs of students, employees and the community are met.

> Today's public expects its schools not simply to teach the fundamentals, but 'to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,' all in a school environment that is safe and encourages learning. (Schools 'prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conductive of happiness and as indispensable to the practice of self-government in the community and the nation'). The law itself recognizes these responsibilities with the phrase *in loco parentis* . . .

Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County, et al. v. Lindsey Earls, et al., LoisLaw 01-332 (U.S. 2002). [Citations omitted.]

School administrators bear the day-to-day responsibility for ensuring that these expectations and a myriad of duties are met in school districts throughout Missouri. Superintendents and principals serve as school district and school building chief administrators with major and final responsibility for the daily operation of public school programs within their communities.

Sections 168.191, 168.201 and 168.211, RSMo., provide that the various school boards throughout Missouri are authorized to hire superintendents. These superintendents responsibilities include in part: general supervision of all personnel, facilities, equipment, and programs; budget preparation and administration; hiring and personnel decisions; construction, maintenance and repair of buildings and equipment; purchase of all supplies and equipment; and administration and supervision of all instructional and other programs. *Id.* Principals assist the superintendent in fulfilling these duties and assist in oversight of the day-to-day operations of particular buildings. They directly handle issues arising with staff, students, and parents, and must respond quickly and appropriately, considering the needs of students, teachers and the community.

Administrators are held accountable by local school boards and the community for the results of the educational programs they administer and for the achievements of the students in their districts. Collective bargaining would greatly erode the professional judgment, discretion and flexibility administrators need to meet these demands, funneling a significant amount of the control over such

decisions to third parties with no accountability for the education of students and no direct connection to the affected communities. *See supra* Argument II.C. at 26.

In the increasingly complex world of public education, it is critical that administrators be permitted to exercise professional judgment and discretion. Collective bargaining creates an additional layer of bureaucracy that does not allow such discretion. Relatively straight forward issues such as who will substitute for a sick teacher; who will serve as cheerleader sponsor; who will assist "Charlie" by reviewing his Algebra test for fifteen minutes after school; and what to do when school starts fifteen minutes late or an assembly runs ten minutes long, become unduly complicated and the subject of debate and dispute.[34] The contract and unions govern, not common sense. Administrators will find it increasingly difficult, if not impossible, to meet the daily needs of school districts and the other demands placed on them by school boards and the community at large. Collective bargaining does not allow administrators the latitude they need to manage these situations optimally.

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[34] In Michigan, mandatory subjects of bargaining include management right clauses, rental of company houses, class loads, textbook selection, subcontracting of exclusive teacher bargaining unit work, instructional time, extracurricular duties, schedule changes in length of school day or preparation time, and criteria and format of teacher evaluations. Munk, *supra* note 6 at 10-11.

Administrators will also face additional obstacles regarding personnel and staffing decisions. Administrators will no longer be free to sit down with employees one-on-one to discuss needs, concerns and performance to determine what is in the best interest of the students and the employees. Instead they must defer to contracts, arbitrators, negotiators and lawyers for decisions on issues that school personnel have historically resolved among themselves.

An additional and significant responsibility of school administrators is administering and accounting for school districts' finances. Administrators are responsible to execute decisions and policies of the boards to whom they report, and they are held accountable for their financial decisions. Collective bargaining takes away the control administrators need to manage resources and to operate school districts effectively and efficiently.

Parents, school boards, teachers and the citizenry look to administrators for answers when problems arise in school districts. Administrators are expected to resolve disputes and to manage the day-to-day operations of school districts to ensure that the delivery of educational services occurs smoothly, without excessive interruption or incident. Administrators will continue to be held accountable for the successes and failures of school districts, yet will be forced to cede authority and final decision making to unions, contracts, lawyers and negotiators. It is fundamentally unfair to maintain such accountability with the loss of administrative control that accompanies collective bargaining.

One superintendent who worked in Illinois, a collective bargaining state, before returning to Missouri, found his Illinois experience to be drastically different and less favorable than his Missouri experience. After working collaboratively with the local Missouri school board for ten years without serious incident, he found the bulk of his time in Illinois was spent dealing with issues surrounding the master contract: bargaining sessions, grievance appeals, and appeals to the state labor relations board, not to mention continuous contact and consultations with school district counsel on how to lawfully handle collective bargaining and labor relations issues. He found that the contract dealt almost exclusively with employees' rights. "In essence, we focused on adult issues . . ., [taking] away from our ability to focus on programs and issues that were in the best interest of the students of our school district." Bill Gussner, Superintendent of Schools, Webster Groves School District, St. Louis, Missouri, Testimony Before the House of Representatives Labor Committee February 2, 1999). *See* Appendix 7.

> Education must be about our children. Collective bargaining pulls the focus of administrators from what is in the best interest of students to what is in the best interest of unions and what is written in the contract. The only beneficiaries of collective bargaining are the lawyers, negotiators and unions specializing in this area.
>
> We cannot expect administrators, teachers and others in the school districts to continue to provide the fundamentals in education, to feed and care for our children before and after school, to continue to provide extra curricular activities,

and to continue to prepare our children for the next century while at the same time diverting their limited resources to meet obligations imposed by the collective bargaining process. Collective bargaining in public schools is not in the best interest of students.

IV. The Decision to Adopt Public Sector Collective Bargaining Lies With the Missouri Legislature.

In *City of Springfield v. Clouse*, 206 S.W. 2d 539 (Mo. banc 1947), this Court prohibited the city of Springfield from entering collective bargaining contracts with labor unions representing city employees on matters relating to wages, hours, collection of union dues and working conditions. *Id.* at 641. This Court recognized that public employees enjoy the right to form labor unions but found that collective bargaining by public employees is entirely different in that "legislative discretion cannot be lawfully bargained away." *Id*. at 542-43. This Court determined that the power to set wages, hours and working conditions of public employees is purely a legislative function that cannot be delegated away or to a third party through the collective bargaining process. "Under our form of government, public office or employment never has been and cannot become a matter of bargaining or and contract. This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative power." *Id*. at 545. [Citations omitted.]

The Missouri legislature provided an avenue for public employees to join labor unions voluntarily and to require employers to meet and confer with labor union representatives so that the voice of its members can be heard. *See* Sections 105.510-.520, RSMo. The Missouri legislature, however, deemed it necessary to vest final decision making authority in the governing body, the entity bearing final responsibility to the public. *See* Section 105.520, RSMo. *See also State ex rel. Missey v. City of Cabool*, 441 S.W. 2d 35 (Mo. 1969); *Curators of the University of Missouri v. Public Service Employees Local No. 45, Columbia*, 520 S.W.2d 54 (Mo. banc 1975); *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1983).

Missouri law clearly establishes that governing bodies, including school districts, cannot bargain away or contract away the determination of qualifications, tenure, compensation and working conditions. To do so would violate the separation of powers provisions of the Missouri Constitution, would constitute a surrender of autonomy and authority by school districts, and would not be in the best interest of school districts, students or community members, including parents, taxpayers, teachers and administrators.

Any change to the meet and confer statutes or any effort to extend collective bargaining to the public sector should be pursued through the Missouri Legislature.

V. Grievance Resolution

The majority of school grievance cases can be resolved by the application of well established and structured grievance procedures set out in published board regulations.

Local school boards in Missouri are granted broad authority to adopt rules and regulations pursuant to § 171.011, RSMo.:

> The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner.

This court has upheld the general authority granted to boards of education to promulgate rules, *Streeter v. Hundley*, 580 S.W. 2d 283, 286 (Mo. banc 1979) and the enforceability of published rules. *Bd. of Educ. of Mt. Vernon Schools. v. Shank*, 542 S.W. 2d 779, 782 (Mo. banc 1976); *Hagely v. Bd. of Educ. of Webster Groves*, 930 S.W. 2d 47, 50 (Mo. App. 1996); and *Shepard v. South Harrison R-II School District*, 718 S.W. 2d 195, 198 (Mo. App. 1986).

However, local school board authority is not without bounds. The appellate court in *School Dist. of Kansas City v. Clymer*, 554 S.W. 2d 483, 487 (Mo. App.

1977) provided a useful summary of the parameters of board authority: The board is "subject to the guidelines of the statute and to due process of law considerations, and subject also that in the exercise of its powers a board may not act in an unreasonable, arbitrary, capricious or unlawful manner." *Id*. Although the board may unilaterally and at any time amend or repeal their adopted rules, regulations and policies “in like manner,” until a board invokes the formal statutory process to do so, they are bound by their own existing legislation so long as it is not in direct conflict with other state and federal law. § 171.011, RSMo.

In this case, The Board of Education for the Jefferson City School District had, pursuant to statute, adopted, signed, deposited and published a policy to address employee grievances, Appendix 8, and that policy was in place at all relevant times.

Although not pled specifically in the initial petition, appellant Thruston appears to have taken advantage of that part of the district’s grievance procedure entitled “Informal Consultation with Immediate Supervisor or Administrator at the level of Concern” when she and Appellant Gifford attended a meeting with Assistant Superintendent Sharpe on October 25, 1999 “in order to apprize the District of problems in her classroom for which District assistance was requested.” Circuit Court Petition, paragraph 7. Furthermore, she states that she filed her grievance on December 1, 1999, and appears to have proceeded to and attempted to take advantage of the Level One of the district’s formal grievance procedures,

entitled “Statement of Formal Grievance to Immediate Supervisor”, by filing her grievance in writing on the prescribed grievance form.

Board policy dictates that “the immediate supervisor shall arrange for a conference to take place within five (5) days after receipt of the grievance,” which conference, according to the petition, occurred on December 2, 1999, well within the prescribed five days. According to attachments to the petition, the following persons were in attendance at the conference to discuss her grievance on December 2nd: Thruston; her principal, Estella Murphy; Director of Elementary Education, Kathy Foster; and E.R. Dalrymple, identified on Thruston’s grievance form as a representative of Missouri Federation of Teachers and explicitly requested by Thruston as the first of two choices of persons she wished to attend the conference with her.

In Attachment A to her formal grievance form, Thruston identifies the issues and concerns that she wished to be addressed. However, in Attachment C, entitled “Resolution Requested,” Thruston does not specify the action she wishes administration or other district personnel to take to meet her request nor does she specify the remedy she seeks. If such specific requests were made in the December 2, 1999 meeting, they are not set out in the pleadings. The principal issued a written response to Thruston on December 8, 1999, again within the five business days required by board policy. On its face, it appears to attempt to address points and issues that correspond to the points contained in Thruston’s Attachment A.

Beyond this, the pleadings are silent as to Thruston's attempts to pursue the district's grievance process. Neither do the pleadings indicate any specific failures by district personnel to comply with its own published policies. Reviewing Appellants' original petition on its face, as the trial court was obliged to do in ruling on the motion to dismiss, we are left to assume that Thruston made no further attempt to proceed through the remaining three levels of the district's grievance policy, effectively abandoning the process.

If Thruston was not satisfied with the disposition she received from her building principal, the appropriate course of action – and the appropriate advice that she should have received from AFT representatives – was to proceed step-by-step through the grievance procedure through levels Two, Three and Four, review by the Assistant Superintendent, Superintendent and the Board of Education, respectively. Instead, Appellants ask this Court to overlook their failure to take advantage of the process available to them and adopt their gargantuan leap in logic that this case involves issues related to collective bargaining.

In MSTA's long history of assisting members in resolving their disputes using grievance policies and procedures, the Jefferson City policy is representative of many districts' policies. It provides for multiple levels of discussions and review first by administrators and finally, if an issue can not be resolved up through the chain of command, the grievant is ultimately entitled to a hearing before the school board. In the infrequent circumstance where the grievance is not

resolved satisfactorily by board level review, the grievant may proceed to the judicial system depending upon the nature of the claims and procedural status.

It is important to compare the grievance procedures discussed above from those that are in place in actual union contracts as the result of collective bargaining "negotiations", usually by the AFT or the NEA, the two largest teacher unions.[35] Generally, they are three or four step procedures, with the final level being binding arbitration, although some allow for appeal from an arbitrator's decision. The most significant differences relate to the tremendous scope of the subject matter and the complexity of the procedures. The 1998-2000, Agreement between the Los Angeles Unified School District and United Teachers-Los Angeles (affiliated with both the AFT and the NEA, and the CTA and CFT) is 280 pages long, not including 46 pages of appendices.[36]

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[35] Moe, *supra,* note 28 at 152 fn. 2, where he observes that it is difficult to obtain precise, reliable figures on their membership numbers and that the AFT is especially secretive about the number of its members who actually are teachers, which apparently is about half of them.

[36] 1998-2000 Agreement, Los Angeles Unified School District and United Teachers-Los Angeles, Art. V, § 1.0. Copies of the four union Grievance Procedures discussed herein are attached as Appendix 9.

The Los Angeles procedure is rather legalistic. It contains timelines to process each step, policy exclusions on matters reserved to the courts, policy exclusions reserved to other sections of the contract, and the identity of potential claimants based on individual claims, joined claims, class claims, or union claims. It has rules wherein discussion of the merits is not a waiver of a defense that the matter is not arbitrable, rules about confidentiality, and rules about dismissals with prejudice. These are all areas usually requiring the expertise of counsel.

Recent grievance procedures for the cities of Chicago, San Diego, and New York are similar to the Los Angeles plan in that all define grievance to cover the broadest possible scope of some very long, detailed, complicated documents. They all provide standing for an individual, the bargaining unit, and the union, and all contain timelines where the process moves to higher levels culminating in arbitration. Arbitration is undertaken by a panel of varying numbers, but as high as seven members, selected from a contractually negotiated list.

Implementation of collective bargaining ultimately means implementation of just such cumbersome, obtuse procedures. To avoid any prejudice to a person's rights by misunderstanding or not understanding the grievance procedure and the very long contract, counsel almost certainly will be procured by all parties in the early going. There will be the associated process costs described above attached to every grievance, including release time of parties and witnesses, half of the arbitration costs and fees, costs of substitutes, and the list goes on.

The grievance procedure at issue in the case before the Court appears to provide an adequate multi-level process for airing and resolving grievances. It is a process where an individual and the district can timely accomplish resolution without resort to outside counsel or 7 member arbitration panels. It is not clear from the record how, when, or why the grievance procedure failed, but whatever the failures, they cannot reasonably be bootstrapped into a claim for collective bargaining rights for all Missouri public employees.

Recognizing that a school district grievance policy must meet appropriate legal standards and is subject to judicial scrutiny, we remain supportive of utilizing board published grievance procedures with safeguarded processes to resolve and protect the grievants' rights. That can be done much more effectively and efficiently and to the mutual benefit of all teachers and school districts without the huge leap to adoption of public sector collective bargaining.

CONCLUSION

WHEREFORE, MSTA and MCSA request that the trial court's judgment dismissing plaintiff's petition be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage pre-paid, this _____ day of October, 2002 to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in S.Ct. Rule 84.06(b) and that the brief contains 9,840 words. The undersigned further certifies that the disk simultaneously filed with the hard copies of this brief has been scanned for viruses and is virus-free.

_____
Attorney

APPENDIX